State Bar of Michigan

Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933-2083
Telephone: (517) 346-6300 or (800) 968-1442
Fax: (517) 482-6248

August 28, 2003

Michigan Supreme Court
Clerk's Office
Michigan Hall of Justice
925 W. Ottawa, 4th Floor
Lansing, MI 48915

Re: File No. 2002-34; Proposed amendments to MCR 7.204, 7.210 and 7.212

Dear Mr. Davis:

On May 5, the State Bar submitted general comments to the Court on this file. This letter supplements those comments concerning the proposed amendments to MCR 7.212. Since May 5, we have been engaged in an intensive effort with Court of Appeals Chief Judge Whitbeck and his staff to arrive at an alternative to the proposed amendment that is likely to advance the Chief Judge's laudatory delay reduction goals without sacrificing quality in the briefing and decision-making processes. Although we were unable to do so in the time allowed, our effort has broadened our understanding of the complexities of appellate delay and reinforced our conclusion that the proposed changes concerning the intake stage will not only fail to achieve the intended benefit, they will exacerbate delay at later stages of the case management process.

Two findings stand out in particular. First, until the Court of Appeals "warehouse" problem has been eliminated, reductions in intake processing times create a pointless "hurry up and wait" scenario. The State Bar has been a stalwart advocate of funding for the resources necessary to eliminate the warehouse. If the resources that have now been committed to the elimination of the warehouse prove to be insufficient to meet the Chief Judge's targets, as he now suggests might be the case, we can be counted on to support additional resources. Second, the data show that record production delay is a key problem area in the intake stage. For both these reasons, we urge the Court to reject the arbitrary changes proposed for the intake stage, and defer further consideration of the proposed amendments to MCR 7.212 until the report of the Court's record production work group has been produced and its conclusions factored into the analysis of the intake stage.

The attached letter to Chief Judge Whitbeck elaborates on these points. Specifically, our Intake Delay Reduction committee employed two veteran analysts with extensive experience in Court of Appeals' case management analysis, James McComb and Anne Vrooman, to review available data. Their review shows that at this time, while delay in the post-intake stage represents such a significant portion of the time to disposition, changes in the intake stage will not achieve the desired result, and instead indicates that more targeted responses to problem cases hold more promise of achieving the desired result.

We want to emphasize again that we share the Chief Judge's desire to eliminate true delay from Court of Appeals' case processing. As the Court of Appeals correctly noted in its Progress Report No. 1, "[d]elay reduction is a complicated undertaking and the delay reduction plan of the Court of Appeals has a number of moving parts." Given that complexity, it is essential that court rule changes be carefully calibrated to achieve the intended effect. Unlike initiatives to increase the capacity of the Court of Appeals to process cases which change pace but not process, changes in court rule briefing times are intended to be a permanent alteration of the working machinery. The changes proposed for MCR 7.212 would have a serious negative effect on the practices of appellate lawyers and the service they offer their clients. For very good reason, the ABA standards on Appellate Court Disposition caution that delay reduction goals should not become rules for the appellate courts, and counsel that the standards themselves should be developed after appropriate involvement of, and consultation with, those whose work they monitor. We are pleased that the dialogue between the Bar and the Court of Appeals on the intake stage is now well underway, and that the comment period that the Court has provided to the Bar on the rule changes has afforded an opportunity for the State Bar and its affected sections and practitioners to register their concerns.

In summary, in moving forward, we urge that the better course concerning this court rule change proposal is one of caution rather than a questionable quick fix, and that all those vested in this process be afforded sufficient time to weigh in.

Sincerely,

Scott S. Brinkmeyer
President-Elect, State Bar of Michigan

Cc: Chief Judge William Whitbeck
Members of the Appellate Delay Reduction Task Force and Intake Delay Reduction Committee

Attachment: Letter to Chief Judge Whitbeck

State Bar of Michigan

Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933-2083
Telephone: (517) 346-6300 or (800) 968-1442
Fax: (517) 482-6248

August 28, 2003

The Honorable William C. Whitbeck
Chief Judge
Michigan Court of Appeals
925 W. Ottawa Street
Lansing, MI 48933

Dear Chief Judge Whitbeck,

First and foremost, on behalf of the State Bar and the Intake Delay Reduction committee members, I wish to thank you for the opportunity, cooperation and patience you have afforded us to join the Court's effort to reduce delay throughout the appellate process. We recognize the great strides your Court has made in reducing the delay in your chambers, and throughout the Court. You have done this with perhaps the highest ratio of cases per judge in the country and in the face of severe budget constraints. The State Bar and the Appellate Practice Section continue to support the goal of delay reduction, have supported the Court's effort to obtain additional funds for staff, and are interested in continued cooperative and joint efforts to improve the appellate administration of justice in Michigan.

The Court and its internal committees worked long and hard on the current proposal before presenting it to the public. As you know, the State Bar was not able to begin consideration of the questions raised by your proposals until well after your internal work was over. While the members of our committee are experienced practitioners, it has taken time to organize, understand the nature of the problem, develop common understandings and language and to assemble and begin to understand the data on case flow throughout the appellate process. Thank you and Chief Clerk Sandra Mengel for your willingness to assist us with data to analyze the problem cases.

Having reviewed significant data, we believe that revised briefing deadlines should not be adopted at this time. Instead, we urge the Court of Appeals to join us in requesting the Supreme Court to table consideration of the proposed amendments of MCR 7.202 until the new Supreme Court work group on record production has issued its findings and recommendations.

Our analysis suggests that, if the warehouse period were eliminated, 88.9% of all cases would be disposed of in less than 18 months. Given the Court's goal of disposing of 95% of all cases within 18 months, only 6.1% of the cases remain to be addressed in some way to reduce delay. These problem cases need to be studied more carefully, but our initial review suggests that many (over 50%) had long delays in transcript preparation and also experienced delays in the Court of Appeals' receipt of the lower court record. This suggests to us that

more targeted and effective steps to deal with the problem or "outlier" cases can be identified through further study of the record production process.

At the same time, we do not believe that the Court should adopt a rule that will affect all cases, imposing severe hardship on appellate practitioners and compromising quality briefing, in order to deal with only 6.1% of the cases. Our review of the data suggests that more targeted and effective steps will be forthcoming after study of the problems that have caused these small groups of cases to take so long. (See Tab A). It also suggests that cutting briefing times may not bring the Court closer to its stated goal because the problems stem from a different source.

We requested additional data from the Court in part to determine if we could suggest a differentiated briefing schedule based on particular types of cases. Unfortunately, the data we have reviewed do not show a particular type of case that can be moved more or less quickly. Rather, the data suggest that the problem cases are split between order and opinion cases, and include both claims of appeal and cases on application, and both civil and criminal cases. This being so, we are unable to propose any differentiated briefing schedule at this time. It remains our belief that some sort of differentiated briefing schedule is a desirable goal, but that requires further analysis and a study of the characteristics of these cases. We are certainly willing to continue to investigate this issue and see if we can develop a sensible differentiated briefing proposal, but any such proposal at this time would be based on incomplete knowledge.

Having made these preliminary points, let us share with you the more in-depth discussion and analysis that form the underpinnings to our views.

First, this response will not reiterate comments already made by the State Bar's Delay Reduction Task Force. For your convenience, we are appending its report to this letter. (Tab B) It is excellent and proposes many approaches that could significantly reduce the time on appeal. Many of these approaches are supported in the literature as offering opportunities for efficiency that do not take away time necessary for the Court or the attorneys to produce a quality product.

We will next comment on the stated goals of the Court as we understand them; refer to several of the ABA standards on Appellate Court Disposition times; review some of the results of our data analysis; and place the results in the context of our recommendations, which we believe are the best steps to achieve the Court's timing objectives, preserve a high volume professional appellate bar, and not significantly decrease the time and thereby endanger the quality of the briefs filed by all who appear before the Court.

The Court's Goals:

On page two of your July 17, 2003 letter to me you stated the Court determined an "overall goal of deciding 95% of all cases within 18 months of their filing" and to achieve this goal it would be necessary to decide opinion cases within "300 days on average."

ABA Standards:

The Court has referenced the ABA Standards on Appellate Court Disposition Time in benchmarking both the importance of a more timely appellate process and the measures of how effective a court is in achieving resolution of the cases before it.

Section 3.52 of the 1994 Standards of Relating to Appellate Courts states:

"Sec (a) Purpose: Time standards should be used to develop an administrative goal to assist in achieving caeflow management system that is efficient, productive and produces quality results. Cases vary in complexity of legal issues and length of record and no single time standard is appropriate for each appeal. To measure the efficiency of an appellate court in processing its entire caseload, courts are encouraged to adopt standards which provide that, for any given period, a percentage of appeals complete each appellate function within a certain number of days."…
"(b) Overall Time Standards: Timely disposition of appeals is a cooperative effort among those responsible for the administrative, lawyer and judicial functions in a court system. **Time standards should be developed by each court after appropriate involvement of, and consultation with those whose work they monitor. These goals are not intended to become rules for the appellate courts…**The function of time standards is to establish a method for assessing whether these rules and procedures are successful." (Emphasis added; see also excerpts from Appellate Court Performance Standards and Measures, Tab C.)

We applaud the Court's efforts to reduce delay. At the same time, we believe that these efforts should be fine-tuned to ensure that they do not reduce the quality of briefing or the quality of opinion-writing and thus the quality of the appellate decision-making process. Fortunately, our review suggests that current efforts to increase Court staff and eliminate the warehouse coupled with ongoing efforts to examine and address transcript and record production delay will allow the Court to meet its goal without compromising quality or imposing hardships on either the bench or bar by adopting unrealistic deadlines.

The Data:

In 2001 the Court of Appeals decided approximately 7,600 cases. 4,500 were resolved by order and 3,100 by opinion. The average time for processing and opinion cases in 2001 was 653 days, of which 271 days was spent in the Warehouse. The Warehouse "extends from the date the case is ready for research, through the date it is sent to research, until the date is it actually assigned to a research attorney. Other than preliminary screening to assist in assigning the case to a research attorney, nothing substantive happens to the case when it sits in the Warehouse." Progress Report No. 2, 11/20/02, p 2.

Looking at just opinion cases, only 24.8% reached an opinion within 18 months of filing. By 30 months the figure was 90.92%

Warehouse Delay:

We reviewed the data for the year 2002. Of the 7,347 cases included for analysis, warehouse delay affected 34.6% of all cases, and 80% of opinion cases. If the warehouse were eliminated, cases disposed of within 290 days would increase dramatically:

- 61% within 290 days
- 71% within 365 days
- 89% within 547 days (18 months)

Cases over 18 months old would drop from 32% to 11.1%.

For opinion cases only, elimination of the warehouse would increase the one year disposition rate from 17.4% to 44.9%, and the 18 months disposition rate from 34.3% to 79%.

For all cases, the mean (average) time for disposition was 336.4 days, and the median time to disposition was 220 days. Eliminating the warehouse would reduce the mean (average) time to disposition to 247.3 days, and the median time to disposition to 201 days.

Record Delay:

The trial court record by rule should be transmitted to the Court of Appeals within 21 days after the brief has been filed or the time for filing the appellee's brief has expired. MCR 7.210(G). 30% of the cases we reviewed had records that were untimely transmitted to the Court. If the record were timely filed in all cases, 89.7% would be within the 18 month period.

Transcript Delay:

A work group has been appointed by the Supreme Court to examine this issue and make recommendations. We recognize the interrelated issues of county budgets, transcript page rates, circuit court usage of reporters, uneven automation, lawyer failures in payments, and other seemingly intractable problems. Nonetheless, moderate reduction in delays in transcript production will further reduce delays – particularly in the troublesome outlier cases. Late transcripts and late requests for transcripts due to bad docket entries are a major portion of delay in many of the "old" cases. The work of this task force potentially will contribute to the Court's goal, but without reducing the time for good briefing which is the foundation of the appeal, and which, when done well, identifies the difficult cases and aids the Court by focusing and shortening its research time. In addition, in those cases where the delay in the receipt of the record is substantial, earlier briefing will not help reduce delay but will only worsen the problem of stale briefs that is already caused by the warehouse.

Remands in Criminal Appeals:

MCR 7.208(B) allows an appellant in a criminal case to file a postjudgment motion in a criminal case within the time allotted for filing the appellant's brief. MCR 7.211(C)(1) permits an appellant to file a Motion to Remand to the trial court to address an issue that requires development of an evidentiary record. In essence, this permits the trial court and Court of Appeals to consider issues that in other states would be handled after the direct appeal has been completed, in what are commonly referred to as post conviction motions. These motions add months to the intake time of opinion cases. We do not have specific data on the number of cases this affects, but we are aware that it will increase the delay in a number of criminal cases. While we are not proposing changes in this area, two points are important.

First, the delays in these cases are part of Michigan's unique combining of the direct appeal with certain post-conviction remedies. This adds time to the initial appeal, but it reduces the total appellate time, since it removes a very significant motion practice off the trial courts and subsequent appeals from post-conviction motions raised after the initial appeal. Indeed, much of the United States Department of Justice concern about delay in criminal cases is the use of the "one after another" appeals that take years to complete. The present practice does not completely preclude post-conviction remedies in criminal cases; criminal defendants can file Motions for Relief from Judgment under MCR 6.500 et seq. But it does substantially reduce the likelihood of success of such motions, since relief may not be granted on the basis of any issue raised in a Motion for Relief from Judgment that could have been raised in an appeal of right, unless the defendant can meet the extremely difficult "cause and prejudice" standards of MCR 6.508(D).

Under the present system, extra time is often needed to conduct investigations and prepare all issues for the appeal of right. If the time is severely shortened, Michigan will be forced to revert to the system used in other

states. The result will be additional incarceration for those criminal defendants with a meritorious issue that can be raised only after conviction, and a reduction in the finality of criminal convictions affirmed on appeal. The time saved will be more than offset by the added years and work engendered by the post conviction process.

Conclusion

We believe that eliminating the warehouse, reducing record and transcript production delays, and removing remand cases from the total will, by themselves, achieve the Court's 18 month/ 95% goal. Additionally, the steps outlined in the State Bar's Delay Reduction Task Force Report will provide further significant reductions. Electronic advances and teleconference orals will provide added time resources and reallocate personnel to bring more to bear on monitoring and production.

Again we thank you for your patience and the generous allocation of time by you and your staff. I would be delighted to discuss our analysis further and offer our continued support to your budget requests, the work of the Task Force and the development of a differentiated case management system for our briefing schedules.

Sincerely,

Scott S. Brinkmeyer
President-Elect, State Bar of Michigan

Attachments: Description of 2002 Disposition Data
State Bar of Michigan Delay Reduction Task Force Report
Appellate Court Performance Standards and Measures (1999) (excerpt)

cc: Justices of the Michigan Supreme Court
Donald M. Fulkerson
Timothy K. McMorrow
James R. Neuhard
Mary Massaron Ross